# Antitrust Law and Effects on Innovation, Quality and the Labor Market

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Antitrust law debates usually emphasize price effects while other elements of competition get less attention. Three recent writings by leading antitrust thinkers, however, explore the interaction between antitrust law and competition, on the one hand, and innovation, quality and long-term labor markets, respectively, on the other. As summarized below, each piece discusses an attribute of competition other than price that might be used to provide a more accurate description of the dynamic competitive effects in any market.
Professors Spencer Weber Waller and Matthew Sag of Loyola University Chicago School of Law discuss competition law and *Promoting Innovation* in the *Iowa Law Review*. (Available here.) The paper starts with Joseph Schumpeter's well-known observation that innovation is the key to long-term growth and often results from "creative destruction." Instead of deriving *laissez faire* antitrust principles from such insights, however, the paper argues that antitrust law should – and, for the most part, already does – encourage companies to act like disruptive entrants and police their later acts that would entrench their success and prevent later creative destruction.

The paper's defense of its thesis starts with Justice Scalia's "greed is good" passage from his opinion in *Trinko*:

The opportunity to charge monopoly prices – at least for a short period – is what attracts "business acumen" in the first place; it induces risk-taking that produces innovation and economic growth.

It then goes on to discuss both Section 2 cases (like the DOJ's pursuit of Microsoft in the browser matters) and even Section 1 cases (like DOJ's recent eBooks actions against Apple and publishers) as attempts by enforcers and courts to stop the quashing of disruptive technologies. Because of creative destruction's importance for long-term economic growth, the paper calls for greater emphasis by the enforcers on protecting it in case selection and competition advocacy, even if it means shifting resources away from cartel enforcement in small or local industries.

Professors Maurice Stucke of the University of Tennessee College of Law and Ariel Ezrachi of The University of Oxford take on *The Curious Case of Competition and Quality.* (Available here). Enforcers usually assume that competition and quality are positively correlated and, to the extent price and quality vary, consumers will rely on a "you get what you pay for" heuristic. The paper explores times when those assumptions break down and finds two necessary conditions: consumers have limited ability to assess quality differences and sellers have difficulty conveying such inherent quality differences.

Those two conditions are often found in experience or credence goods – such as restaurants or vitamins – where consumers are able to determine quality, if at all, only after "consuming" the product. Advertising, rating services or, more recently, online reviews can help but can also be deceptive, manipulated or focused on specific quality attributes unimportant to a particular consumer. The paper also identifies industries, such as airlines and hospitals, where competition and quality might even be negatively correlated. The paper offers no broad policy suggestions other than that enforcers question more often their usual assumptions about the connection between competition and quality.

Finally, David Balto, former FTC staffer and now well-known private antitrust attorney and commentator on this blog and elsewhere, has co-authored an amicus brief in the Eleventh Circuit urging reversal of the FTC's *McWane* decision. You should recall that a divided FTC found McWane used an exclusive dealing program to monopolize a market for domestic ductile iron pipe fittings. (If not, more details on the case can be found in this prior blog post). While the company and its other amicus supporters challenge the FTC decision on more traditional monopolization

grounds, this brief on behalf of the United Steelworkers union claims the FTC "erred in failing to recognize that sustaining a robust workforce … is a cognizable procompetitive justification for a practice under the antitrust laws."

Likely reactions by members of the antitrust community to such claims might be a roll of the eyes and quick dismissal. Certainly the FTC's appellate brief succinctly rebuts the argument in a single footnote that simply cites *National Society of Professional Engineers* for the proposition that antitrust laws do not allow the weighing of policy interests, like industrial stability, with competitive effects. But I think such quick rejections misunderstand the brief's more nuanced attempt to show that labor market effects might also have long-term effects on competition in the product market.

The brief relies heavily on Dick Steuer's *Jobs and Antitrust*, published in *Antitrust* magazine during the recent recession and available here. Applying the theory to the facts, the brief emphasizes that McWane had the last domestic foundry making such fittings. Implementing the exclusive dealing program could have been a way to assure sales for that foundry, efficiently plan production and ensure a continued source of fittings for consumers. The alternative could have been the closing of the factory; inefficiencies for the company, at least while it shifts to greater foreign production; the loss of jobs and the purchasing power the salaries provide the workers; and the loss of skills to this industry and others as the workers moved to other occupations. Both the short- and long-term results could be fewer choices and reduced competition available to future consumers.

Antitrust lawyers and economists can myopically focus on static models of competition and obsess over price effects. These three writings try to correct that short-sighted view with a long-term and dynamic look at competitive effects other than price that might give a more complete view of competition in any given market. Because such an accurate description of competition is a goal of antitrust, these three texts are worth a closer look.